LAWRENCE HEAH SOON THUAN v. HEAH SOON HWA & ANOR

HIGH COURT MALAYA, GEORGETOWN
NORDIN HASSAN JC
[CIVIL SUIT NO: 22NCVC-226-07-2013]
30 JULY 2015

CONTRACT: *Letter of authority – Sale of lands – Commission – Payment of – Whether agreed sum paid to plaintiff upon completion of sale – Whether agreement existed between plaintiff and defendants – Whether made with free consent for a lawful consideration – Whether letter of authority redundant and superseded by sale and purchase agreement – Whether sale and purchase agreement independent from agreement between plaintiff and defendants pursuant to letter of authority – Whether parties performed obligation under contract – Plaintiff forced defendants to choose a particular buyer for sale of lands – Whether contemporaneous documents between parties considered – Contracts Act 1950, s. 10*

Vide this action, the plaintiff claimed, among others, for the sum of RM2,717,133.60 being the commission for a sale of two pieces of land located in Seberang Perai Selatan. The plaintiff was one of the beneficiaries of the estate of his late father. The defendants were the executors and also beneficiaries of the deceased's estate. Pursuant to a letter of authority dated 13 January 2012, the plaintiff was given the power to sell the deceased's properties ('the said properties') with commission. The plaintiff's sister, who was also one of the beneficiaries, had signed the said letter as the witness. The letter of authority authorised the plaintiff to sell the said properties for the price of RM25 per square foot and any price above RM25 per square foot would be paid to the plaintiff as commission. In addition to that, it was also stated that the plaintiff would receive 1% commission from the total purchase price of the said properties at RM25 per square foot. A meeting was held at the defendants' solicitor's ('DW1') office to confirm the contents of the letter of authority with the presence of the plaintiff and the first defendant. Pursuant to the said meeting, a letter dated 15 March 2012 was issued and signed by the plaintiff and the first defendant which stated, *inter alia*, that if the said properties were sold by any of the beneficiaries, the commission was any price above the asking price of RM25 per square foot as well as the 1% commission of the said purchase price. Thereafter, the second defendant sent an e-mail dated 30 March 2012 to DW1 and copied to the plaintiff to reconfirm the terms in the letter of authority. Three offers to purchase the said properties were received from various companies and amongst them, the beneficiaries accepted GSM Land Sdn Bhd's offer. On 11 December 2012, the sale and

purchase agreements for the said properties were entered into between the beneficiaries and GSM Land Sdn Bhd for the purchase price of RM30,722,115 and RM2,091,802 for the plaintiff who managed to assist the parties in relation to the sale of the said properties. However, the plaintiff contended that he did not receive his commission as stated in the letter of authority for the sum of RM2,717,133.60. Hence, this suit. The defendants contended, *inter alia*, that (i) the terms in the letter of authority had been overridden and superseded by the execution of the sale and purchase agreements; (ii) the estate had agreed to sell the said properties in lump sum amount and not based on the square foot or area of the land; and (iii) the plaintiff had forced the defendants to choose GSM Land Sdn Bhd as the buyer of the said properties. The issue that arose for consideration was whether the letter of authority was redundant and superseded by the sale and purchase agreements.

Held (allowing plaintiff's claim with costs):

(1) There was an agreement between the plaintiff and the defendants as reflected in the letter of authority. Based on s. 10 of the Contracts Act 1950, the agreement entered into between the plaintiff and the defendants, as reflected in the letter of authority and the letter dated 15 March 2012, were made with the free consent of the parties for a lawful consideration and with a lawful object. The contract was not overridden or superseded by the sale and purchase agreements. As such, a valid and enforceable contract existed between the said parties. (paras 32, 33, 34 & 55)

(2) The parties to a contract must perform their obligation under the contract. On the facts, the sale and purchase agreements were totally independent from the agreement between the plaintiff and the defendants pursuant to the letter of authority. The sale and purchase agreements did not affect the agreement between the plaintiff and the defendants. There was no evidence to show that the plaintiff had waived his entitlement in the said agreement as stated in the letter of authority. Therefore, there was nothing to show that the performance of the obligation under the said agreement had been dispensed with. Further, the defendants could not unilaterally dispense with the performance of their obligations under the said contract. (paras 35, 38 & 39)

(3) It was not accurate to state that the sale of the said properties was in lump sum amount and not based on the square foot or area of the land. In a subsequent letter from the solicitors for GSM Land Sdn Bhd to the beneficiaries' counsel, it was stated that the purchase price was based on the area of the land. The value above RM25 per square foot could be calculated and determined by deducting the value of RM25 per

square foot from the lump sum amount. Therefore, the defendants' argument in relation to the lump sum amount was devoid of any merits. (paras 42 & 43)

(4) The contents of the plaintiff's e-mail dated 26 July 2012 did not show any threat or force by the plaintiff for the beneficiaries to choose GSM Land Sdn Bhd as a buyer of the properties. Apart from this, from the closing date to buy the said properties, *ie*, the date GSM Land Sdn Bhd was chosen as the buyer of the said properties, the beneficiaries had not spoken or communicated with the plaintiff. As such, it was unlikely for the plaintiff to threaten or force the beneficiaries to accept GSM Land Sdn Bhd as the buyer. (para 45)

(5) GSM Land Sdn Bhd's land offer was the best among the companies that offered to purchase the said properties based on the combination of the offered purchase price and the term of payment of the said purchase price. Further, the plaintiff has discussed with the first defendant the reasons to choose GSM Land Sdn Bhd as the buyer and the first defendant agreed with the plaintiff. (paras 47 & 48)

(6) The first defendant was not called to testify. There was also no evidence to show that the first defendant was not fit to testify in court except for the evidence of DW3 that the first defendant was not in good health. As such, the plaintiff's evidence stood unchallenged and accepted. (*Takako Sakao v. Ng Pek Yuen & Anor*; refd). (paras 48 & 49)

(7) The beneficiaries had made statutory declarations which, *inter alia*, stated that they chose GSM Land Sdn Bhd on the express understanding and agreement that the estate would receive RM30,722,155. The two other companies that had offered to purchase the said properties were introduced by brokers and based on the second defendant's e-mail, these brokers were also entitled to the price above RM25 per square foot and 1% commission if their proposed company managed to purchase the said properties. DW1's testimony that the brokers for the other two companies would only be getting 1% as commission and not the said "top up" above RM25 per square foot could not set aside the second defendant's e-mail being the contemporaneous document. (paras 50, 52 & 53)

(8) The defendants had to pay the plaintiff, *inter alia*, (i) 1% commission of the purchase price at RM25 per square foot in the sum of RM282,878.60; and (ii) the commission for the purchase price above the price of RM25 per square foot in the sum of RM2,434,255. (para 57)

Case(s) referred to:
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 10, 21, 38(1)

For the plaintiff - K Goik; M/s Nasir Kenzin & Tan
For the defendants - B Jeyasingam; M/s Ghazi & Lim

Reported by Kumitha Abd Majid

JUDGMENT

Nordin Hassan JC:

Introduction

[1] The plaintiff commenced this writ action against the defendants among others for a total sum of RM2,717,133.60 being the commission for a sale of two pieces of land located at Seberang Perai Selatan, Penang.

[2] The plaintiff is an Australian citizen who resides at 100C, Ten Seldom Circles Winthrop, Western Australia and one of the beneficiaries of the estate of his father Heah Eng Keat, the deceased.

[3] The first defendant is the plaintiff's brother who resides at No. 4D, Jalan Masjid Negeri, Penang.

[4] The second defendant is the plaintiff's sister who resides at No. 32, Morphett Cresent, Bateman, Western Australia.

[5] The first and second defendants are the executors and also beneficiaries of the deceased's estate.

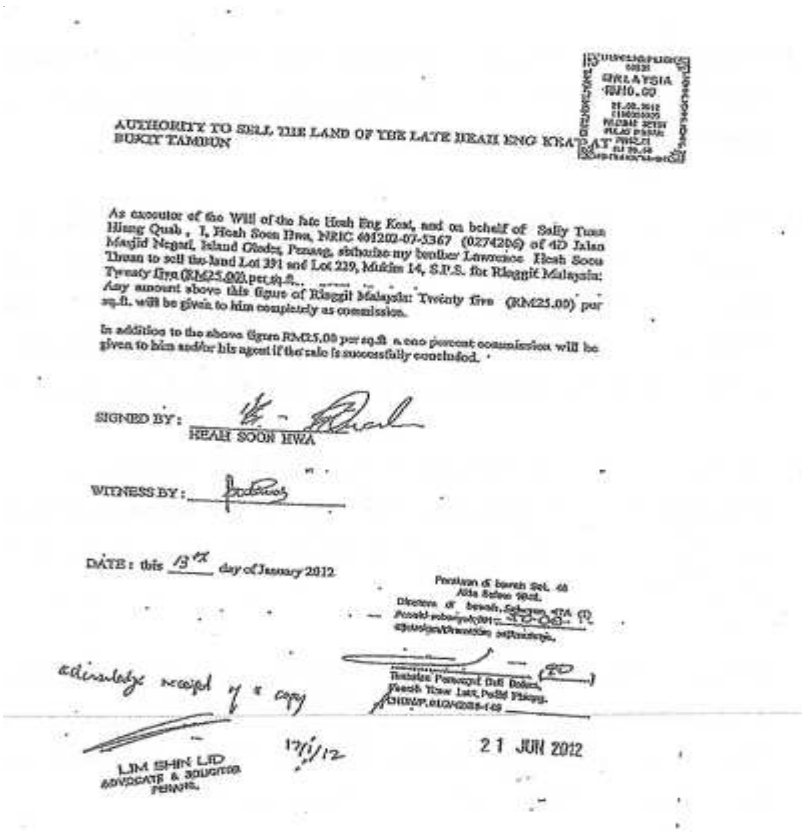
[6] The two pieces of land belonging to the estate which were the subject matter of the sale in the present case are Lot 229 and Lot 391, Mukim 14, Seberang Perai Selatan, Pulau Pinang.

Background Facts

[7] Heah Eng Keat, the deceased who passed away on 6 May 2010 had left two pieces of properties which were Lot 229 and Lot 391, Mukim 14, Seberang Perai Selatan, Pulau Pinang measuring 1,131,514.38 square feet ("the said properties").

[8] On 10 February 2011, pursuant to the grant of probate issued by Penang High Court, the defendants are made the executors for the deceased's estate.

[9] Subsequently, pursuant to a letter of authority dated 13 January 2012 which were signed by both the defendants, the plaintiff was given the power to sell the said properties with commission as stated in the said letter which is reproduced as follows:



AUTHORITY TO SELL THE LAND OF THE LATE HEAH ENG KEAT
BUKIT TAMBUN

As executor of the Will of the late Heah Eng Keat, and on behalf of Sally Tuan Hiang Quah , I, Heah Soon Hwa, NRIC 491202-07-5367 (0274256) of 4D Jalan Masjid Negeri, Island Glades, Penang, authorise my brother Lawrence Heah Soon Thuan to sell the land Lot 391 and Lot 229, Mukim 14, S.P.S. for Ringgit Malaysia: Twenty fifty (RM25.00) per sq.ft.. Any amount above this figure of Ringgit Malaysia: Twenty five (RM25.00) per sq.ft. will be given to him completely as commission.

In addition to the above figure RM25.00 per sq.ft a one percent commission will be given to him and/or his agent if the sale is successfully concluded.

SIGNED BY:
HEAH SOON HWA

WITNESS BY:

DATE: this 13th day of January 2012

Pentadbir di bawah Sek. 48
Akta Setem 1949.
Director of Inland Revenue, Malaysia.

Terimakasih Pemegang Buku Bekas,
Kaunter Tiket Lama, Pudu Penang.

Acknowledge receipt of a copy

17/1/12

LIM SHIN LID
ADVOCATE & SOLICITOR
PENANG.

21 JUN 2012

[10] One of the beneficiaries, Heah Tuan Lai, who is the plaintiff's sister signed this letter of authority as witness.

[11] This letter of authority was also sent to the defendants' solicitor, Lim Shin Lid (DW1) who acknowledged the receipt as shown on the said letter.

[12] As stated in this letter of authority, the plaintiff was given the power to sell the said properties for the price of RM25 per square foot and any price higher than RM25 per square foot will be paid to the plaintiff as commission. In addition to that the plaintiff will also be paid 1% of the purchase price based on RM25 per square foot.

[13] On 9 March 2012, a meeting was held at DW1 office with the presence of the plaintiff, the first defendant and DW1. The meeting among others was to confirm the content of the said letter of authority dated 13 January 2012.

[14] Pursuant to the said meeting, on the 9 March 2012, a letter dated 15 March 2012 was issued and signed by the first defendant and the plaintiff. This letter was also acknowledged by DW1. For ease of reference, the said letter is reproduced and shown below:

> 4D, Jalan Masjid Negeri
> Island Glades
> Penang.
>
> 15th March 2012.
>
> Mr. Lim Shin Lid
> Khoo Keat Siwew & Co
> Advocates & Solicitors
> Chulia Street
> Penang.
>
> Dear Sir,
>
> We confirm that at the meeting between yourself and us at your office dated 9tn March 2012, the followings were discussed and agreed.
>
> 1. There is no written offer to purchase the land of the late Heah Eng Keat at Bukit Tambun.
> 2. The land, Lots 391, 229, 423 and 424, Mk 14, SPS can be sold in two lots if necessary. One lot to consist of 391 and 229 and the other lot 423 and 424.
> 3. Should the sale of the above land be sold by others and not by the beneficiaries of the estate, the commission is limited to 1% of the sale price.
>
> Should the land be sold by any of the beneficiaries of the estate of the late Heah Eng Keat, the commission is any price above the asking price of RM25.00 per sq ft as well as the 1% commission mentioned above.
>
> Yours faithfully
>
> Sgd Sgd
>
> MICHAEL S.H. HEAH LAWRENCE S.T. HEAH.

[15] The important facts in this letter dated 15 March 2012 as stated at para. 3 are as follows:

(ii) If the said properties were to be sold by any of the beneficiaries the commission are the price above the price of RM25 per square foot and the 1% of the said purchase price.

[16] Thereafter, on 30 March 2012, the second defendant issued an email to DW1 and copied to the plaintiff which stated the following:

(i) the second defendant had spoken to the first defendant and majority of the beneficiaries of the estate.

(ii) the second defendant stated that any party, irrespective whether the party is beneficiary of the estate or not is entitled to the commission the price above the price of RM25 per square foot.

(iii) it also stated that the offer to be extended for 21 days from 1 April 2012 to allow the plaintiff to submit his client's offer.

[17] The selling of the said properties was handle by the solicitors for the estate, Messrs Khoo Keat Siew & Co and DW1 was the solicitor in charge of the sale.

[18] The closing date for any party to buy the said properties was on the 23 July 2012.

[19] On the said closing date, three offers to buy the said properties were received by Messrs Khoo Keat Siew and they were:

(i) Pinsit Development Sdn Bhd for the price of RM30,724,719.

(ii) GSM Land Sdn Bhd for the price of RM30,722,115.

(iii) DNP Land Sdn Bhd for the price of RM30,000,000.

[20] The plaintiff had secured GSM Land Sdn Bhd as one of the buyers for the said properties and if GSM Land were to succeed in buying the said properties, the company had promised to give the plaintiff RM2,091,802.

[21] After the said closing date, DW1 had asked the beneficiaries of the estate to choose among the three companies who had offered to buy the said properties.

[22] After having received the decision from the beneficiaries, DW1 wrote a letter dated 1 August 2012 to CP Tang & Partners, solicitors for GSM Land Sdn Bhd informing that their client's offer to buy the said properties was accepted.

[23] On 11 December 2012, a sale and purchase agreements were entered by the beneficiaries of the estate and GSM Land Sdn Bhd for the purchase price of RM30,722,115 for the said properties and RM2,091,802 for the plaintiff who had managed to assist them to buy the said properties.

[24] However, no payment was made by the defendants to the plaintiff with regard to the commission as stated in the letter of authority dated 31 January 2012 with a total sum of RM2,717,133 which the details are as follows:

(i) the difference to the purchase price at RM25 per square foot and the actual purchase price RM30,722,115 RM28,287,880 = RM2,434,255.

(ii) 1% commission from purchase price at RM25 per square foot which is RM28,287,800 = RM282,878.60.

The Issues To Be Tried

[25] The main issue to be tried in this case is whether the letter of authority dated 13 January 2012 was redundant and superseded by the sale and purchase agreements dated 11 October 2012 between the beneficiaries of the estate and GSM Land Sdn Bhd.

The Plaintiff's Contention

[26] Counsel for the plaintiff contended that the plaintiff had never waived his rights or entitlement stipulated in the said letter of authority dated 31 January 2012. It was also argued that there was no evidence to show that the terms in the said letter of authority had been affected, changed or superseded. Therefore, counsel for the plaintiff submitted that the execution of the sale and purchase agreements dated 11 October 2012 between GSM Land Sdn Bhd and the beneficiaries of the estate had not superseded the terms in the letter of authority.

The Defendants' Contention

[27] Conversely, the defendants contended that the terms in the letter of authority has been overridden and superseded by the execution of the said sale and purchase agreements dated 11 October 2012.

Findings Of The Court

[28] It is not disputed that the defendants had signed the said letter of authority dated 13 January 2012. The defendants also is not disputing as to the terms stated in the said letter which among others stated that any price above RM25 per square foot for the said properties will be the commission for the plaintiff. In addition to that the plaintiff will also received 1% commission from the total price of the said properties at RM25 per square foot.

[29] The facts also show that the plaintiff had agreed with the terms in the letter of authority by sending a copy of the letter to the solicitor for the estate (DW1) who acknowledged receipt of the said letter.

[30] The terms in the letter of authority dated 13 January 2012 was further confirmed in a letter dated 15 March 2012 signed by the plaintiff and the first defendant. This letter was also sent to DW1 who then acknowledged receipt of the said letter.

[31] An e-mail dated 30 March 2012 from the second defendant to DW1 and copied to the plaintiff, re-confirmed the terms in the letter of authority dated 13 January 2012.

[32] Now, having considered the facts and the said letter of authority, it is obvious that there is an agreement between the defendants and the plaintiff. Pursuant to this letter of authority, there is a valid, binding and enforceable contract between the defendants and the plaintiff.

[33] Section 10 of the Contracts Act 1950 provides as follows: A

> All agreements are contract if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

[34] In the present case, I am satisfied that the agreement made between the defendants and the plaintiff as reflected in the letter of authority dated 13 January 2012 and the letter dated 15 March 2012 has been made by free consent of the parties, for a lawful consideration and with a lawful object. As such there exists a valid and enforceable contract between the defendants and the plaintiff. B

[35] Next, it is trite law that parties to a contract must perform their obligation under the contract. C

[36] This is stated clearly under sub-s. 38(1) of the Contracts Act 1950 as follows:

> 38(1) - The parties to a contract must either perform, or offer to perform their respective promises, unless the performance is dispensed with or excused under this Act, or any other law. D

[37] In the present instance, firstly the sale and purchase agreements dated 11 October 2012 are between GSM Land Sdn Bhd and the beneficiaries of the said properties. This agreements are in relation to the sale of the said properties by the beneficiaries to GSM Land Sdn Bhd for total sum of RM30,722,115 and a commission of RM2,091,802 for the plaintiff for his effort in assisting GSM Land to buy the said properties. E

[38] Having perused the sale and purchase agreements including s. 21 of the said agreements, I am of the view that these agreements are totally independent from the agreement between the plaintiff and the defendants pursuant to the said letter of authority dated 13 January 2012. The sale and purchase agreements dated 11 October 2012 is in no circumstances affected the agreement between plaintiff and the defendants. F

[39] There is also no evidence in this case to show that the plaintiff has waived his entitlement in the said agreement as stated in the letter of authority. Therefore there is nothing to show that the performance of the obligation under the said agreement has been dispensed with. Certainly the defendants cannot unilaterally dispense with the performance of their obligations under the said contract. G H

[40] Apart from this, there is also nothing before this court to show that the performance of the obligation under the said contract has been excused under the Contracts Act 1950 or any other written law.

[41] In relation to this matter, the defendants had raised the issue that the estate have agreed to sell the said properties in lump sum amount and not based on the square foot or area of the land. The defendants have relied on I

their solicitor's letter dated 4 July 2012 to CP Tang and Partners counsel for GSM Land which mentioned the said lump sum amount of RM32,813,916. Therefore it was argued that the contention that the estate is only entitled for the sum of RM28,289,860 which is RM25 per square foot is not true.

[42] On this issue, it is not accurate to say that the sale of the said properties is in lump sum amount and not based on the square foot or area of the land. In a subsequent letter from CP Tang and Partners dated 26 July 2012 to Messrs Khoo Keat Siew & Co, counsel for the beneficiaries, it clearly states that the purchase price is based on the area of the land. Counsel for GSM Land said this:

> We write to inform you that the Purchase Price of RM32,813,916 only is based on the area of 539,054.92 square foot for Lot 229 and 592,459.46 square foot for Lot 391 after deducting the acquisition of 97,474,71 square foot by the Government.

[43] In any event, I agree with counsel for the plaintiff that the value above RM25 per square foot can be calculated and determined by deducting the value of RM25 per square foot from the lump sum amount. Therefore the defendants' argument on this lump sum amount is devoid of any merits.

[44] The next issue raised by the defendants is that the plaintiff had forced them to choose GSM Land Sdn Bhd as buyer of the said properties. One of the documents presented before this court is the plaintiff's e-mail dated 26 July 2012 which was sent to all the beneficiaries.

[45] Having read the e-mail, I am of the view that the content of this e-mail does not show any threat or force by the plaintiff for the beneficiaries to choose GSM Land as buyer of the properties. Apart from this, from the closing date to buy the said properties which is on the 23 July 2012 to 1 August 2012 which was the date GSM Land was chosen as buyer of the said properties, the beneficiaries had not spoken or communicate with the plaintiff as confirmed by one of the beneficiaries, the second defendant. As such it was unlikely for the plaintiff to threaten or force the beneficiaries to accept GSM Land as the buyer.

[46] Furthermore the selling of the said properties was handled by the solicitors for the beneficiaries. If at all there was a threat or force by the plaintiff, they could inform the solicitors (DWI). However in DW1's testimony nothing was said about the threat or force by plaintiff as alleged.

[47] In addition to this, the facts shows that GSM Land's offer is the best among the companies that offered to purchase the said properties based on the combination of the offered purchase price and the term of payment of the said purchase price.

[48] The plaintiff also in his testimony said that he had discussed with the first defendant the reasons to choose GSM Land Sdn Bhd as the buyer and which was agreed by the first defendant. No evidence was produced by the defendants to contradict the plaintiff's evidence.

The first defendant was not called to testify. There was also no evidence to show that the first defendant is not fit to testify in court except the evidence by DW3 that the first defendant is not in good health. As such the plaintiff's evidence stand unchallenged and accepted by this court.

[49] In relation to this issue, the Federal Court in the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 75 held as follows:

> (1) An important omission missed by both the lower court was the fact that the first respondent never gave any evidence to refute the appellant's testimony. In fact, only the appellant testified on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. The first respondent was the only other person other than the appellant, who was fully conversant with the facts but she refrained from giving evidence. Thus, the evidence given by the appellant ought to be presumed to be true. The trial judge ought to have accepted the appellant evidence as true in the absence of any evidence from the first respondent going the other way and his failure to direct himself in this fashion occasioned a serious miscarriage of justice.

[50] The beneficiaries of the estate also have made statutory declarations which *inter alia* stated that the beneficiaries have chosen GSM Land Sdn Bhd on the express understanding and agreement that the estate will receive RM30,722,115.

[51] However, one of the beneficiaries, DW2 during cross-examination could not explain what she meant by "express understanding and agreement" as stated in her statutory declaration.

[52] Be that as it may, one important fact to be noted here is that the two other companies that had offered to buy the said properties were also introduced by brokers. As confirmed by DW1, the broker for Pinsit Development Sdn Bhd was Mr Ng Kam Foo and Mr Rocky was the broker for DNP Land Sdn Bhd.

[53] Based on the second defendant's e-mail dated 30 March 2012, these brokers were also entitled to the price above the RM25 per square foot and 1% commission if their proposed company manage to purchase the said properties. Although DW1 in his re-examination said that the brokers for Pinsit Development and DNP Land will only be getting 1% as commissions and not the said "top up" above RM25 per square foot but DW1's oral evidence in court certainly cannot set aside the said e-mail by the second defendant being the contemporaneous document.

[54] In the present case, GSM Land had managed to buy the said properties for the purchase price of RM30,722,115. The commission as stated in the second defendant's e-mail has to be paid to the broker and the broker was the plaintiff who is also one of the beneficiaries.

[55] Having considered the law and the evidence in totality, I find that the contract between the defendants and the plaintiff as reflected in the letter of authority and also the letter dated 15 March 2012 is valid and binding until now. This contract was not overridden or superseded by the said sale and purchase agreements dated 11 October 2012.

Conclusion

[56] Based on the aforesaid reasons, I find the plaintiff has proved its case on the balance of probability and therefore I allow the plaintiff's claim.

[57] The defendants are to pay the plaintiff as follows:

(i) 1% commission of the purchase price at RM25 per square foot in the sum of RM282,878.60.

(ii) the commission for the purchase price above the price of RM25 per square foot in the sum of RM2,434,255.

[58] I also order the defendants to pay the plaintiff the interest of 5% per annum for the whole judgment sum of RM2,717,133.60 from the judgment date until full realisation.

[59] The defendants also to pay the plaintiff costs of RM20,000.